United States Court of Appeals for the Second Circuit



APPELLEE'S APPENDIX

76-1544

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Appellee-Plaintiff,

VS.

LEONARD JOHNSON and LEROY McCLAMB,

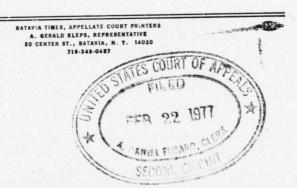
Appellant-Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

APPENDIX FOR APPELLEE

RICHARD J. ARCARA, United States Attorney, Western District of New York, Attorney for Appellee-Plaintiff, 502 United States Courthouse, Buffalo, New York 14202.

EDWARD J. WAGNER, Assistant United States Attorney, of Counsel.



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APPENDIX

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5 7 FLOYD THOMAS, 97 Beverly Road, Buffalo, New York, 8 called as a witness on behalf of the Government, and being first duly sworn, testified as follows: 11 DIRECT EXAMINATION BY MR. WAGNER. Q. Mr. Thomas, I would like you, sir, to tell the members of 14 the jury what your occupation is? A. I'm a letter corrier for the United States Post Office. 15 O. Approximately, sir, how long have you had such position? 16 A. Ch. approximately twenty-six years. 17 Q. At the present time do you work a certain route in the 18 City of Buffalo? 20 A. Yes, I do. 21 O. What route is that?

H. T. Nael & E. F. Knisley
OFFICIAL REPORTERS. U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

A. Well, right now I have changed routes over to another area,

2. Did there come a time, sir, in October of 1975 that you had

I'm over around Delaware and Gates Circle area.

a different route from your present route?

- 1 A. Yes.
- 2 Q. What route were you delivering at that time?
- 3 A. I was working Route 801 which is -- which covers Jefferson,
- 4 East Ferry, Burdy, Elsie, Lyth, Northland, Chester, Waverly,
- 5 in that area.
- 6 Q. Mr. Thomas, I would like you, if you would, to tell us an
- 7 best you recall what you did on Cotober 1, 1975, with re-
- 8 spect to how you started your business day off, what happened
- 9 that day?
- 10 A. I scrted my mail in the morning and --
- 11 Q. Where did that take place?
- 12 A. I beg your pardon?
- 13 Q. Where did that take place?
- 14 A. At Station C, Main and Northampton, and then we send the
- mail out to the relay boxes.
- 16 Q. When, sir, you say you sorted your mail, for the jury's
- benefit, can you describe what you mean, how you sort it?
- 18 A. We sort the mail in a case with the streets and the number
- of the houses on each street in a case, and then the mail
- 20 is tied out and sent out to relay boxes.
- 21 Q. When you say that it is "tied out," what do you mean?
- 22 A. We put it in bundles and put rubber bands around it and
- 23 straps, put it in sacks with labels, to be sent out to our
- 24 different relay boxes.
- 25 C. Do you know, Mr. Thomas, how it is sent out to the various

relay boxes?

1

- 2 A. Sent out by a truck.
- 3 Q. Why is it that you don't carry the mail with you?
- 4 A. It would be too much to carry.
- 5 Q. Can you tell us what you do after the mail is sorted and 6 sent out?
- 7 A. Then we go out on our routes, and what we carried out with
 8 us we deliver, and then after finishing what we have with
 9 us, we go to the relay box to get more mail to be delivered.
- 10 Q. Do you recall, sir, at that time what the streets were that

 11 you delivered first with what you carried?
- A. Yes. I carried Northland Avenue, a portion of Northland
 Avenue and Waverly Street out with me to be delivered, and
 then after finishing that delivery. I go back to the relay
 box at Masten and Northland to get more mail, which would
 have been for Chester Street, and upon --
- 17 Q. Go ahead.
- 18 A. -- upon finishing Chester Street, I go Lack to the relay

 19 box at Masten and Northland to pick up mail for my next

 20 street, which would be Purdy Street.
- 21 Q. The first relay box you come to contains mail for several
 22 different streets?
- 23 A. Yes.
- 24 Q. You take some mail out and come back to the same relay box?
- 25 A. Yes.

- Do you recall, sir, on October 1st going to that relay box? 2 Yes. Do you recall if there was any mail that day on your route
- 5 Yes, there was.

3

4

0. When had you seen that mail?

for Purdy Street addresses?

- 7 A. Well, in the morning when I sorted it and then sent it out 8 by relay, and then again when I -- my first trip to the 9 relay box, when I went there to get my second cutout to 10 deliver for that day, the Furdy Street mail was in the box,
- 11 Q. Would your second cutout be your second bundle of mail?
- 12 My second bundle of mail.
- 13 Q. Do you specifically recall seeing the Purdy Street mail 14 when you first went to the relay box?
- 15 A. Yes.
- 16 Q. You took out what you call a cut of wail, a bundle of wail, 17 what streets did you deliver that to, if you can recall?
- 18 A. Well, that was for Chester Street -- Chester, part of East 19 Ferry, and when I get to East Ferry I pick up mail from 20 another relay box for the other side of Chester, which takes 21 me back to Northland and Masten.
- 22 Did you go back to the Morthland and Easten melay box?
- 23 A. Yes.
- 24 What did you find when you came back there that day?
- 25 When I got back there the box was opened and the lock was

		•	
1		damaged and the mail was gone.	
2	Q.	If you can, give us an estimate of about how long it was	
3		from when you were first at the relay box to when you came	
4		back to the same relay box on Masten and Northland?	
5	а.	I would say it took about forty-five minutes to an hour.	
6	ç.	Can you describe if there was anything in the box when you	
7		came back?	
8	А.	Just my carton that I used sometimes when it is extra heavy	-
9	Ω.	The mail you had seen in there earlier	
10	А.	Was gone.	
11	Q.	Are you aware, sir, of a person on your route I'm re-	
12		ferring to the date of October 1, 1975 by the name of	
13		Marie Jennings?	
14	A.	Marie Jennings, yes. I believe she lived on Purdy Street,	
15		I believe 286 or 268.	
16	δ.	At the 286 address?	
17	Α.	286.	
18	Q.	How is it that you recall that specific address?	
19	Α.	Well, I delivered mail to her everyday.	

A. Lottie Fowler lived at 320 Purdy.

Fowler on Purdy Street?

23 Q. A Dock Daniels?

21

A. Dock Daniels was living at 315 Furdy.

Q. Do you know if you delivered mail to an addressee by the name

Are you familiar with an addressee by the name of Lottie

of Marie McElrath?

- 2 A. Marie McElrath, yes. I den't recall just --
- 3 Q. At 328 Pundy?
- 4 A. Yes.
- 5 Q. Do you recall having delivered mail to a Lemon Houston at
- 6 246 Furdy Street?
- 7 A. Yes.
- 8 Q. Do you recall an addressee by the name of S.G. Pendleton?
- 9 A. S.G. Pendleton, 214 Purdy.
- 10 Q. And do you recall an addressee by the name of Thelma Andorson?
- 11 A. Thelma Anderson was 282 Furdy.
- 12 Q. Do you recall a Lulu Dariels?
- 13 A. Lulu Daniels was 246, I believe.
- 14 Q. Do you recall 268 --
- 15 A. 268 Purdy.
- 16 Q. Do you recall a Susic Hocker?
- 17 A. Susie Fooker, yes, I do, on Fardy.
- 18 Q. 264 Purdy?
- 19 A. 264 Furdy.
- 20 Q. Do you recall, sir, if your route included a Vane Saunders?
- 21 A. Vane Saunders was 218 Furdy.
- 22 Q. Do you recall a Virginia Carothers?
- 23 A. Virginia Carothers was 323 Purdy.
- 24 Q. Do you recall a Josephine Fergacon on that route?
- 25 A. Yes, at 323 Purdy.

- 1 Q. That was the same address as Virginia Carothers?
- 2 A Yes.
- 3 Q. Do you recall an addressee on your route by the name of
- 4 Idella Pope?
- 5 A. Idella Pope was 218 Purdy.
- 6 Q. Do you recall an addressee by the name of Lola Woolard?
- 7 A. Lola Woolard was 244 Purdy.
- 8 Q. Do you recall a Frances Baynard?
- 9 A. I believe that was 208 Purdy..
- 10 Q. Was a Carrie Dobson on your route?
- 11 A. Carrie Dobson was 3 -- I don't know, I don't recall.
- 12 Q. 328 Purdy?
- 13 A. 328 Purdy.
- 14 Q. Do you recall an Emmie Tucker at 310 Purdy?
- 15 A. 310 Purdy.
- 16 Q. Andrew Griffith?
- 17 A. Andrew Griffith, 330 Purdy.
- 18 Q. Do you recall a Norwood Jenkins?
- 19 A. Norwood Jenkins was 2242 Purdy.
- 20 Q. Could that be 232?
- 21 A. He moved after that.
- 22 Q. Do you recall a John Moore?
- 23 A. John Moore was 246 Purdy.
- 24 Q. Do you recall a Ruth Miller on Furdy Street?
- 25 A. 292 Purdy.

- 1 Do you recall, sir, that day specifically having mail addressed to these Purdy Street -- some Purdy Street addresses? 2
- Yes, I co. 3

5

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11

Is there anything unusual, unusual from a postal standpoint, Q. 4

about the mail on the first of the month?

- A. Well, it's very heavy because of the checks, a lot of checks in the mail, plus other magazines and advertisements.
- Q. I would like, if you could, to pick up when you came back 8 9 and found the relay box had been opened and you described the lock having been broken off, can you tell us what you 10
- Yes, I went to the nearest phone and notified the Post Office 12 Department. 13
- Q. Anything else at that time by you in this incident? 14

did at that time, if anything?

- A. Beside the -- well, the postal inspectors and the station 15 which I worked out of. 16
- 17 O. In other words, that concluded your day's activities as a mail carrier?
- 19 A. No. I still had to go on and deliver what mail I had left 20 in the other relay box.
- Q. I take it you did that?
- A. Yes. 22

24

- 23 MR. WAGNER: I have nothing else. Thank you very much.
- CROSS EXAMINATION BY FIRS EARDICHDU:

- 1 Q. Mr. Thomas, I congratulate you on your recall of addresses.
- 2 How long did you work Purdy Street?
- 3 A. I was there over a year.
- 4 Q. And many of the names, you were familiar with the people?
- 5 A. Yes, familiar with the people or names, you work the streets
- 6 everyday.
- 7 Q. You testified the checks always came on the first of the
- month, was that always true, in your experience?
- 9 A. The checks, the first and the third.
- 10 Q. And the third?
- II A. Yes.
- 12 Q. The third day of the month?
- 13 A. The first and the third day of the month they have checks.
- 14 Q. You don't know which kind of checks?
- 15 A. The first is SSI and Welfare, on the third is Social Security.
- 16 Q. You know the third is Social Security?
- 17 A. Yes.
- 18 Q. And of your own knowledge, are you familiar with what kind
- of checks were there?
- 20 A. When, on which date?
- 21 Q. October 1, 1975.
- 22 A. Welfare and SSI.
- 23 Q. You were away from the box, the third box, the one that con-
- 24 tained Purdy Street --
- 25 A. The first box.

- 1 Q. How long to you estimate you were away from that box?
- 2 A. Well, between fort -five minutes to an nour.
- 3 Q. And at any time did you observe Lercy McClamb at that box?
- 4 A. No. I didn't.

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5 MISS HANDSCRU: I have nothing further.

7 CROSS EMAMINATION BY MR. MC LECO:

- 8 Q. Mr. Thomas, you stated that in relationship to your work
- 9 performed on the 1st of October last year, that the first
- 10 thing you did was sort the mail at the C Station on Kain
- 11 and Northland?
- 12 A. Northampton.
- 13 Q. Okay. Did you sort the mail alone for your particular route?
- 14 A. Yes, I do.
- 15 Q. And you go through all the letters and magazines, I take it.
- for the various streets and divide them up?
- 17 A. Yes, on my route.
- 18 O. During the course of dividing them up -- how do you do that?
- 19 A. We sort -- we case the mail for each street, the magazines
- on a separate side and the letters are all in the case.
- 21 Q. Do you so the sorting and putting it in these cases or is
- 22 that done by someone else?
- 23 A. We do our own.
- 24 Q. You divide things up by streets?
- 25 A. Yes.

- 1 Q. And did you at that time at the C Station put them in numerical order?
- 3 A. Yes, corresponding to the house numbers on each street.
- 4 0. You did that that day?
- 5 A. Yes.
- 6 Q. Now, do you recall the type of mail that was delivered to
 7 the residents on Purdy Street that date?
- 8 A. That date?
- 9 Q. Yes.
- 10 A. Well, there was none for the even side and about five houses
 11 on the odd side, but the type of mail that was in there was
 12 checks and magazines and other letters for those people.
- 13 Q. There were none for the even side?
- 14 A. No.
- 15 Q. Okay.
- 16 A. Because that was the mail that was missing from the box.
- 17 Q. I am talking about the sorting.
- 18 A. Sorting? Yes, we had mail for all the streets in the case,
 19 yes.
- Q. When you sorted them there was mail for the even side, there
- 21 was mail for the odd side?
- 22 A. Yes.
- 23 Q. And all the checks, were they on the even side of the street
- or did they go on both sides?
- 25 A. Checks went on both sides.

- 1 Q. Okay. Now, in relationship to the checks themselves, you indicated to Miss Eardschu the checks arrived on the first and third of each month?
- 4 A. Yes, we have checks coming in the first and third of each month.
- 6 Q. Did you know at that time who received what on the firm,
 7 as opposed to the third?
- 8 A. Well, there's welfare checks and SSI on the first, and on the third there's Social Security.
- 10 Q. Social Security and SSI as well, or is that a separate ---
- 11 A. No, Social Security on the third, and SSI and welfare checks
 12 on the first of the month.
- 13 Ω. Do you know what types of checks various residents on I m.dy
 14 Street were receiving at that time?
- 15 A. They receive all types of checks, welfare and SSI. Some receive welfare, some SSI checks.
- 17 Q. Who received what, did you pay any particular attention to that?
- 19 A. Well, we usually -- you usually remember that a certain
 20 person gets SSI, some get welfare.
- 21 Q. The names that were read to you by Mr. Wagner, do you recall
 22 which of those people received SSI as opposed to welfare
 23 checks?
- 24 A. No. those are SSI checks.
- 25 Q. When you sorted mail out at the C Station, what did you do

with it after you sorted it?

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- 2 A. We bundle it up and tie it out and put it in a sack, and then
 3 put a label in it, and send it out by truck to the various
 4 relay points.
- 5 Q. You put it in a sack, label the street?
- 6 A. Yes, with the street where the relay box is.
- 7 Q. And it is given to someone else?
- 8 A. Given to the driver to carry it to the -- take it out there.
- 9 Q. You gave it to a driver that date?
- 10 A. I put it on the truck with all the rest of the mail for

 11 relays, he comes in and takes the truck and sorts it, and

 12 takes -- carries the mail out to the different relay points.
- Q. And you first saw your sack for your particular streets,
 particularly the area where this box was opened -- what
 street was that?
- 6 A. Northland and Masten.
- 17 Q. Do you recall what time you finished sorting the mail and putting it on the truck for delivery?
- 19 A. Well, I finished approximately about eight thirty or so in
 20 the morning to get the relays ready, because I have to leave
 21 the station about nine o'clock to get out to my route.
- 22 Q. You got to the Northland and Masten box approximately what
 23 time that day?
- 24 A. The first time I go to that box is around nine, nine thirty.
- 25 Q. Between nine and nine thirty you got there that day?

- 1 A. The first time, yes.
- 2 Q. When you got to the hox that day what did you do?
- 3 A. I opened the box and got the mail for -- after I finished
- d carrying what I carried out, I got my smil for the second
- 5 cut.
- 6 Q. That came from where?
- 7 A. From the relay bex at Serialand and Fastin.
- 8 Q. Was it in a sack?
- 9 A. I take it out of the sack.
- 10 Q. Was that sack a marked sack?
- 11 A. Was it marked?
- 12 Q. Yes.
- 13 A. It's labelled, it has a label in it for that relay point.
- 14 Q. I meant for the particular street?
- 15 A. No, it contains several streets for which I deliver mail.
- 16 Q. Everything is in one sack, and then you go in and sort out
- 17 the various streets?
- 18 A. It's in bundles, and we take out our rail for our next cut
- 19 | we are going to work.
- 20 Q. Ckay. You have to look through the sack to get that parti-
- 21 | cular cut?
- 22 A. There is usually more than one burdle in there that we have
- 23 to -- you know, of work we have to do.
- 24 Q. And the first cut that you were taking from this box was
- 25 | for what area?

- 1 A. For Chester Street.
- 2 Q. Chester is where in relationship to Purdy?
- 3 A. It's -- Chester is two blocks down from Furdy, running from
- 4 Northland to East Ferry and beyond.
- 5 Q. You do Chester first then you go back and get the mail for
- 6 Purdy?
- 7 A. Yes.
- 8 Q. And this mail for Chester, was it on the top of your eack
- 9 in the bundle?
- 10 A. It's in the sack, it would get tossed around. It would get
- 11 to the top or bottom, it is never --
- 12 Q. When you got to the sack originally at the Northland and
- Masten box, did you go through it entirely?
- 14 A. We take all the mail, set it on the upper shelf in the box,
- 15 yes.
- 16 Q. You did that?
- 17 A. Yes.
- 18 Q. Then you went to this route and came back?
- 19 A. Yes.
- 20 Q. Okay. Now, you came back to this box at approximately what
- 21 time, sir?
- 22 A. Back to the box approximately ten thirty or quarter to
- 23 eleven, something like that.
- Q. And at that time you noticed the box was --
- 25 A. I noticed that the door was -- when I approached the box

- the door was open, and I could see the lock was damaged,
- and when I locked is the sail was gone.
- 3 | O. All of the reil'
- 4 A. The mail for Jundy spreet was all I had left.
- 5 Q. Purdy Street was the only rail you left in the box?
- 6 A. When I came back the mail ser Fordy should have been in
- 7 there but it wasn't.
- 8 0. The other rail for the other streets --
- 9 A. No, I had delivered that.
- 10 Q. Now, in relationship to Leonard Johnson, do you know an
- individual by the name of Leonard Johnson?
- 12 A. No. I don't believe I do.
- 13 Q. In relationship to this box, did you at any time see anyone
- 14 break into it?
- 15 A. No, I didn't.
- 16 Q. Do you have any direct knowledge as to when the box was
- 17 broken into?
- 18 A. It was between -- sometime between ten and the next forty-
- 19 five minutes or so when I got back to the box.
- 20 Q. Do you know how it was broken into?
- 21 A. I don't know. All I know the door was broken open and the
- 22 lock was damaged.
- 23 Q. Do you have any knowledge as to who the individual or indi-
- 24 | viduals were who may have broken into the box?
- 25 A. No. I don't.

1 MR. MC LECD: Thank you.

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3 REDIRECT EXAMINATION BY MR. WASHER:

- for furdy Street. Do you recall what addresses were on the
 mail that was missing, in other words, what addresses would
 it have gone to if it hadn't been missing?
- 8 A. It would have gone to the addresses from 330 Furdy down to
 9 208 Purdy, and from 309 Purdy to 323 Purdy.
- Q. Was that mail that you specifically seen in the box earlier,
 you said you put it up on the shelf, it was that mail that
 was missing when you returned?
- 13 A. It was missing, yes.
- Q. The addresses that I read off and the names, would they have been included in the addresses of the mail that should have been there in the box when you came back?
- 17 A. Yes.
- 18 Q. And which was missing?
- 19 A. Yes.
- 20 MR. WAGMER: I have nothing clse. Thank you.

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RECROS EXAMINATION BY MISS HANDSCHU:

23 Q. Mr. Thomas, on October 1, 1975, did you make any kind of
24 listing of what mail you had before you put it into the
25 sack?

- 1 A. No, we wouldn't have time to do that.
- 2 Q. You sorted your mail in macks and placed them on the deli-
- 3 very truck?
- 4 A. Yes.
- 5 Q. About how many pieces of sail did you handle at that time
- 6 when you worked that route the first of the month?
- 7 A. For the whole route?
- 8 Q. Yes.
- 9 A. Oh, it's really hard to tell.
- 10 Q. Could you give us an estimate?
- 11 A. About seven to eight hundred letters, I believe, plus maga-
- 12 zines and other various types of mail.
- 13 Q. On the morning of October 1st of 1975 year could have sorted
- as many as seven or eight hundred pieces of mail?
- 15 A. Yes.
- 16 Q. We are talking about mail for the numbers 330 through 208
- 17 Purdy, and 309 through 323 Purdy?
- 18 A. Yes.
- 19 Q. And are you cortain on the morning of October 1st, 1975
- 20 that you saw mail for those few addresses?
- 21 A. Yes, I always get mail for those addresses.
- 22 Q. No, I'm not interested in what you always got, I am interested
- in what happened on October lat, a year ago, your specific
- 24 recollection of October 1st.
- 25 A. October 1st was a check date, we always bud checks for just

about everybody on the street.

- Q. I don't mean to be picky, but I want an independent recollection of seeing things that particular day for those numbers.
- 4 THE COURT: If you don't have such recollection, you can

so state. Do you remember that particular day

and what you particularly had that day --

THE WITHESS: Yes, I believe --

THE COURT: -- as opposed to what you normally would have?

THE WITNESS: I didn't have mail on October 1st for everybody on the route there, if that's what you mean.

BY MISS HANDSCHU:

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- 12 Q. You saw each and every envelope for each and every person
 13 that was mentioned?
- 14 A. Yes. I sorted it in the morning to the various numbers.
- 15 Q. You particularly remember the envelope for Mrs. Jennings?
- 16 A. I know she got a check that day, yes, supposed to get a check that day.
- 18 Q. That is what I mean, you do it so often, your kind of job
- is a kind of routine where things ordinarily happen on a
- 20 certain day?
- 21 A. Yes.
- Q. Are you saying this on the basis of what ordinarily happens
- 23 | each and every month?
- 24 A. I beg your pardon?
- 25 Q. Are you giving me these answers on the basis of what was

- usual each and every month, Mrs. Jennings got a check each
 and every month?
- 3 A. Yes.
- 4 Q. Are you assuming that Mrs. Jennings got her check for October
 5 let?
- 6 A. You mean do I remember seeing her check?
- 7 Q. Her check specifically.
- 8 A. Well, I can just say I do know that the first of the month
 9 she receives -- usually receives a check.
- 10 Q. We are very concerned about the first of the month, October 1.

 11 1975, did you see her check specifically out of seven or

 12 eight hundred envelopes?
- 13 A. You do pay attention to the names on checks as you are

 14 sorting them into the case, so I would say you, that I do

 15 remember that the check was in there when I cased the mail

 16 in the morning.
- 17 Q. You have an independent recollection of that morning, Octo-18 ber 1st, as opposed to the usual first of the month?
- 79 A. This is a routine situation where every month it's -- every20 day you see the same names and addresses.
- 21 Q. Can you state with any great degree of certainty that there
 22 were checks for all the people whose addresses you recited
 23 in the mail on October 1st when you first sorted it?
- 24 A. I think I could say that their checks were in there, yes.
- 25 Q. You were saving that on the basis of the fact that other

- people had checks in that mail?
- 2 A. Other people have checks in the mail for other streets or 3 other house numbers, too.
- 4 Q. You are drawing a conclusion from other checks that you delivered that day?
- 6 A. I don't understand.
- 7 Q. Are you concluding that the Purdy Street addressees had
 8 mail that day because you delivered other checks?
- 9 A. No, because they usually get checks on the first of the month.
- 11 Q. And they usually get checks is the basis of your answer?
- 12 A. I don't quite understand.
- 13 MISS HANDSCHU: Let's leave it with that. Thank you.
- 15 RECROSS EXAMINATION BY MR. MC LEOD:
- 16 Q. Mr. Thomas, just a couple of more questions. Mr. Thomas, I
- don't want to belabor the point that Miss Handschu was going
- over, but in relationship let's say to Dock Daniels whose
- 19 address --
- 20 A. 315 Purdy.
- 21 Q. You indicated before that he normally got a check the first
- of the month?
- 23 A. Yes.

14

- 24 Q. Do you recall if he get one usually on the third?
- 25 A. I recall his check.

- 1 Q. Cn the third, as well?
- 2 A. His check on the third?
- 3 Q. Would he get them on both dates?
- 4 A. His was -- he gets a check on the first of the month, not
- 5 I believe -- I don't believe the third.
- 6 0. When you get the sail it is -- you bind it at the station?
- 7 A. Yes.
- 8 Q. You have it in your box, you take it out and -- out of the
- 9 sack, put it on the shelves?
- 10 A. Yes.
- 11 Ω. Do you go through everything again?
- 12 A. No, we don't go through --
- 13 Q. Do you know whether or not -- well, do you know what time
- your relay truck left the C Station on the 1st of October?
- 15 A. No. I'm never there when it leaves.
- 16 Q. Do you know whether or not that sack which you put in that
- 17 relay truck --
- 18 A. I put it on the truck, him they wheel the truck out to the
- 19 driver's truck, and he takes the mail.
- 20 Q. Now, who relays it out to the truck, another individual?
- 21 A. The driver comes in and gets his truckload of mail, takes
- 22 it to his truck, and sorts it in his truck.
- 23 Q. There are a number of trucks in this area where your relay
- 24 truck would be?
- 25 A. Well, at the time he is -- I queue when he is in there there

- is no other trucks in there.
- 2 Q. Other trucks would done and go?
- 3 A. Yes.
- 4 Q. Do you know whether or not that sack, which you closed, I
- take it, and put in the area to be put on that relay truck,
- was ever opened again prior to your opening it at the
- 7 Northland and Masten box?
- 8 A. Well, I know that it was intact when I first got to the
- g relay box, it was intact because I bundled it out that
- 10 morning.
- 11 Q. How do you tie it up?
- 12 A. Well, we pull the case and rubber band the letters, and then
- 13 tie them with straps with the magazines and --
- 14 Q. I meant the sack, how do you tie the sack up?
- 15 A. We got a -- it's got a hasp on it, you pull the rope and
- 16 close it and --
- 17 Q. These letters have rubber bands around them you say?
- 18 A. Well, the bundles of mail has rubber bands plus straps
- 19 around it.
- 20 Q. And this strap is like a belt buckle --
- 21 A. Well --
- 22 Q. -- with holes?
- 23 A. Almost like a belt buckla.
- 24 Q. I mean it doesn't take any great degree of knowledge to be
- 25 able to open it and close it?

1	A. No.			
2	Q. Or take the rubber bards off?			
3	A. No.			
4	Q. Do you know whether or not that strap or rubber bands were			
5	removed from any of your packages prior to your getting to			
6	that Northland and Masten box the first time?			
7	A. No. Lut			
8	Q. Just yes or no.			
9	A. State that again.			
10	Q. Do you know whether or not			
11	THE COURT: Read the question.			
12				
13	(Thereupon reporter read as follows: "Q. Do			
14	you know whether or not that strap or rubber			
15	bands were removed from any of your packages			
16	prior to your getting to that Northland and			
17 -	Masten box the first time?")			
18				
19	THE VITNESS: No.			
20	BY MR. MC LECD:			
. 21	Q. You didn't look through the various bundles of mail that			
22	you took cut of the sack and put on the shelf in that box,			
23	did yeo?			
24	P. No.			

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Thank you.

25 MR. MC LECD:

THE COURT: Anything further, Mr. Wagner? 1 Your Honor, just a couple of questions. MR. WAGNER: 2 3 BY MR. WAGNER: Q. Mr. Thomas, as Lest you recall, the mail that you saw in 5 the bag at the relay box was the same mail you bound up 6 that morning at the post office? 7 A. Yes. 8 As far as you can tell? Yes. 10 Nothing else. MR. WAGNER: MISS HANDSCHU: Nothing further. 12 MR. MC LECD: Nothing further, your Honor. 13 THE COURT: All right, Mr. Thomas. 15 (Witness excused.) 16 17 THE COURT: We have had a short evidentiary day, ladies and 18 gentlemen, but we have reached the time when I 19 would normally be adjourning, and I caution you 20 now to keep your minds open on all of the issues 21 that are in the case, do not talk among your-22 selves at this point about what you have been 23

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hearing, try to remember it yourself, and, most

importantly, don't talk with anybody elsc. If

shout it. Also, if you have familiarity already with the geographic area we have been talking about, so he it, but if you do not, den't go out there and look around so you have some outside familiarity with it. We will tell you overything you need to know about the area from the witnesses in the courtrain. You may go now and come back downstairs at nine o'clock in the morning, and I will have you in the courtroom as soon as I can, and we will continue the trial.

(Thereupon the court was in recess at 4 P.M.)

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	Trial Testimony of Secret Service Agent Robert Pochopin.
1	PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 9:05 A.M.
2	
3	(Defendants present, counsel present, jury
4	present.)
5	
6	(Defendant's Exhibit 1 was marked for identifi-
7	cation.)
8	
9	THE COURT: Good morning, ladies and gentlemen. You may
10	remember that I indicated we are working just
11	this morning. We will have a mid-morning recess
12	at the usual time, and then we will break for
13	the day at twelve o'clock.
14	MR. WAGNER: The Government calls Robert Pochopin.
15	
16	ROBERT POCHOPIN, 100 State Street, Rochester,
17	New York, called as a witness on behalf of the Government, and
18	being first duly sworn, testified as follows:
19	
20	DIRECT EXAMINATION BY MR. WAGNER:
21	Q. Mr. Pochopin, I would like you, sir, to tell the jury what
22	your occupation is?
23	A. I am a special agent with the United States Secret Service.
24	Q. Approximately how long have you been with the Secret Service?
25	A. Approximately five and a half years.

- 1 Q. Can you describe for the jury what kind of duties you do
 2 for the Secret Service?
- A. Yes, the duties and functions of the Secret Service, as a

 special agent of the Secret Service, is to protect the

 President, the Vice President, and any candidate for the

 presidency or vice presidency, and fereign dignaturies so

 named by the Treasury Department. Also the investigation

 of any crimes pertaining to obligations of the United States

 Government, such as counterfeit currency, United States

 Treasury checks and United States savings bonds.
- 11 Q. Are you presently assigned to the Rochester office?
- 12 A. Yes.
- 13 Q. In October of 1975, what office were you assigned to?
- 14 A. The Buffalo field office.
- October 6, 1975, that you had occasion to initiate an investigation concerning some possible stolen Treasury checks?
- 18 A. Yes, I did.
- 19 Q. I would like you to tell the jury how it was that you first
 20 became involved with that and what you did?
- 21 A. Yes. On October 6, 1975, I was contacted by an informant
 22 who advised that --
- 23 MR. MC LECD: At this time I would like to object as to what
 24 the conversation may be.
- 25 THE COURT: Of course, that is right, you will not state

the substance of the conversation.

- 2 BY MR. WAGNER:
- 3 Q. You say you were contacted by an informant?
- 4 A. Yes.
- 5 Q. How was the contact made?
- 6 A. Telephonically.
- 7 Q. Can you explain to us what you mean by an informant?
- 8 A. An individual citizen who had information regarding a
- possible crime against the United States Government.
- 10 Q. Do you know this man's name?
- Il A. Yes.
- 12 C. What was that?
- 13 A. James Carbone.
- 14 Q. Vincent James Carbone?
- 15 A. James Vincent Carbone.
- 16 Q. As a result of your conversation with Mr. Carbone on October
- 17 . 6th, did you make any plans?
- A. Yes, we did.
- 19 Q. Would you tell us what the plans were?
- 20 A. The plans were to arrange a meeting for the following day
- at Gleason's Restaurant here in Buffalo, 1000 Main Street,
- for the purchase of United States Treasury Checks.
- 23 Q. Now, did you have in mind, sir, who you would be purchasing
- the checks from at that time?
- 25 THE COURT: Yes or no.

- THE WITNESS: Yes.
- 2 BY MR. WAGNER:
- 3 Q. And can you tell us specifically what the plan involved as
 4 to the place and time of the meeting the next day?
- 5 A. The place was at Gleason's Restaurant, the time was approximately 10 A.M. on Cotober 7, 1975.
- 7 Q. About what time, as best you recall, was it that you talked to the informant on Cetcher 6th?
- 9 A. Approximately 4:30 P.H.
- 10 Q. Now, on the next morning, on October 7th, did you in fact
 11 meet the informant, as your plans had provided?
- 12 A. Yes.
- 13 Q. And that was Mr. Carbone?
- 14 A. Yes.
- 15 Q. Can you recall where it was that you met Mr. Carbone and
 the approximate time?
- 17 A. I met Mr. Carbone at approximately 9 A.M. at the Buffalo
 18 field office here, in the Secret Service Office here in
- 19 Buffalo.
- 20 Q. Where is that office -- where was it at that time?
- 21 A. 111 West Huron Street.
- 22 Q. That is in the Federal Building?
- 23 A. Yes.
- 24 Q. I would like you to tell the jury, sir, what you and Mr.
- 25 Carbone did at that meeting, and what you did subsequent to

that meeting?

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- 2 A. The initial meeting at the field office we just discussed
 3 what the arrangements were, to make sure things were set
 4 up that we were going to meet with individuals who were to
 5 sell U.S. Treasury Checks, and at this time I met with other
 6 agents of the Secret Service and inspectors of the United
 7 States Post Cifice.
- 8 Q. Do you recall, sir, what the names of the other Secret .
 9 Service and Post Office investigators were?
- 10 A. Yes, there were Special Agent James Husted, Special Agent
 11 Stephen Petro, Special Agent Patrick Finnerty, Fostal Inspector
 12 Joseph Parkinson, and Postal Investigator Michael Davis.
- 13 Q. What was your plan, as far as your role in this potential
 14 purchase?
- 15 A. I was going to be operating in an undercover capacity.
- 16 Q. Would you tell us what you did after the meeting occurred?
- 17 A. After the meeting occurred, myself and James Carbone left
 18 the Secret Service office here in Euffalo by a -- in an
 19 official vehicle of the Government, with myself driving,
- 20 and we proceeded to Gleason's Restaurant.
- 21 Q. Can you describe what kind of vehicle you were in, if you recall?
- 23 A. A 1969 maroon Chevrolet.
- 24 Q. Did it have any markings on it?
- 25 A. No.

- Q. Where did you go?
- A. To Gleason's Restrurant.
- 3 Q. If you know, sir, what did the other agents that were at
 4 the office meeting do?
- 5 A. They left beforehand to set up surveillance of the Cleason's
 6 Restaurant erea.
- 7 Q. Was that part of the plan?
- 8 A. Yes, it was.

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- 9 Q. I would like you, sir, to pick up and describe, as best you recall, for the jury what happened that particular morning?
 - A. Upon arrival at Gleason's Restaurant, the entrance way to the parking area, I stopped the vehicle, and Mr. Carbone departed my vehicle and he went into Gleason's Restaurant to see if the individuals who were selling the Treasury checks were in the area. After he got out of my car and went into Gleason's, I continued to the back parking lot, parked my car, and remained in the car.
- 18 Q. Would you tell us what else you saw, what else you observed

 19 that morning?
- A. Approximately two minutes later Mr. Carbone came back to
 my car and advised that the individuals were across the
 street in a doughnut shop, and would be over there in a
 short period of time, be over in the parking area of Gleason's
 in a short period of time. Right after he said this, he
 advised -- he told me that they had just arrived --

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- 1 MR. MC LEOD: I object again to what he was told by Mr. Carbone.
- 2 THE COURT: That is right.
- 3 BY MR. WAGKER:
- 4 Q. Will you tell us after having the conversation with Mr.
 5 Carbone what you saw and what you did?
- A. Mr. Cartone come back to me after I dropped him off at the 6 front of Gleason's Ecstaurant, we had a conversation, and 7 he left my vehicle to the rear of the parking lot to meet 8 with the individuals who supposedly had the Treasury checks 9 for sale. Approximately two minutes later he came back to 10 my vehicle. After he came back we had general conversation 11 about the Treasury checks, and then we proceeded together 12 to a gray 1966 Oldsmobile which was parked in the rear ... 13 far rear area of the parking lot on the North Pearl Street 14 side.
- 16 Q. Had you seen this gray Cldsmobile pull into the parking lot?
- 17 A. No. I didn't.
- 18 Q. Do you know if it was there when you first pulled into the parking lot?
- 20 A. I couldn't be sure of that, no.
- 21 Q. Mr. Pochopin, I am going to show you what has been marked
 22 as Government's Exhibit 22 for identification, and I would
 23 like you to look at that and tell us what that is, if you
 24 know?
- 25 A. This is a photograph of the rear parking lot located behind

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1 Gleason's Restaurant, 1000 Main Street.

- 2 As best you can tell, does that photograph accurately depict 3 the parking lot area as it was the day of the event, on October 7, 1975?
- 5 Yes, it does. It looks like it must have been taken later in the year because the leaves are gone and it appears to 6 7 be snowing, but it is the ---
- Other than the fact that the sons have changed, how about 8 9 the cars there, are they different or the same?
- 10 The cars are different, yes.
- Other than that, is the scene an accurate scene of the lot, 11 12 as you recall it, the day of the event?
- 13 Yes, it is.

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- Showing you Government's Exhibit 21 for identification, 14 again, I would like you to identify that, if you can, sir? 15
- 16 This is another photograph of a different area of the 17 Gleason's parking lot.
- 18 Again, does that accurately depict the parking lot area, as 19 you recall it, the day of the event, October 7th?
- 20 Yes, except the cars are different. P. .
- 21 Q. And the weather was different?
- 22 A. And the weather was different.
- 23 Showing you Government's Exhibit 23 for identification, 0. 24 again, I would like you to tell us if this accurately depicts 25 the scene, as you recall it?

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1	A. Yes, it does. It is another photograph of a different
2	portion of Gleason's parking lot.
3	Q. Showing you Government's Exhibit 24 for identification,
4	again I will ask you the same question.
5	A. Another photograph of another portion of Gleason's parking
6	lot.
7	Q. I show you Government's Exhibit 24(a) for identification.
8	A. Yes, this is another photograph of Gleason's parking lot.
9	MR. WAGNER: Your Honor, I would at this time move into
10	evidence Government's Exhibits 21, 22, 23, 24
11	and 24(a) for identification.
12	MISS HANDSCHU: May we approach the bench?
13	
14	(Thereupon an off the record discussion ensued
15	at sidebar.)
16	
17	THE COURT: We have this type of procedural colloquy from
18	time to time. We are not trying to shut you
19	out of anything.
20	BY MR. WAGNER:
21	Q. Government's Exhibit 21 for identification, sir, I am going
22	to give you one of these red marking pens, and I would ask
23	you if you will mark on there where any of the cars were
24	that you talked about, either your car or the car of
25	the gray Oldsmobile, if it would be on that particular

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the gray Oldsmobile, if it would be on that particular

- photograph.
- 2 A. On this our surveillance vehicle would have been parked --
- 3 Q. Just circle and perhaps write the words "surveillance vehicle."
- 4 A. (witness marks photograph.)
- 5 Q. How, by the way, do you know what kind of vehicle that was,
- the surveillance vehicle?
- 7 A. Yes, it was a 1969 van.
- 8 Q. When you say "van," what kind of a van, do you know?
- 9 A. Chevrolet van or Ford van, I'm not positive.
- 10 Q. Showing you Government's Exhibit 22 for identification --
- II THE COURT: What was that first marking on?
- 12 MR. WAGNER: Government's Exhibit 21, your Honor, was a
- 13 marking of the surveillance vehicle.
- 14 BY MR. WAGNER:
- 15 Q. With Government's Exhibit 22 for identification, sir, would
- 16 you mark on there where, if any, of the vehicles you are
- 17 speaking about were?
- 18 A. Yes.
- 19 Q. As best you can on that photograph.
- 20 A. Yes. The suspects' and probably just the tail of where I
- 21 was parked.
- 22 Q. Perhaps if you could give an arrow and write "tail end of
- where I was parked" since that is how you described it.
- 24 A. Tail end of my car?
- 25 Q. Fine.

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1	а.	(Witness marks photograph.)	
2	Ω.	Showing you Government's Exhibit 23 for identification.	
3		again, I would like you to mark on there, if you can, where	
4		any of the vehicles were that you were speaking of.	
5	А.	This would be the suspects' vehicle.	
6	Q.	Showing you Government's Exhibit 24 for identification.	
7	А.	Okay, this would be a photo taken from the surveillance	
8		where the surveillance vehicle was.	
9	Ω.	Perhaps you should write on there "view from surveillance	
10		vehicle."	
11	А.	(Witness marks photograph.)	
12	Q.	Again with Government's Exhibit 24(a) for identification,	
13		I would like you to mark that indicating where the vehicles	
14		were, if you can, in the photograph.	
15	A.	(Witness marks photograph.)	
16	Q.	Thank you very much.	
17	THE	COURT: What did you mark on 24(a)?	
18	MR.	WAGNER: The indication of the words "My vehicle."	
19		indicating the agent's vehicle.	
20	THE	CCURT: You talk of the surveillance vehicle and "My	
21		vehicle," you are talking of the van?	-

22 THE WITNESS: The van is the surveillance vehicle. My vehicle
23 would be the van, the suspects' vehicle would be

the 1966 gray Oldsmobile.

25 BY MR. WAGNER:

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- 1 Q. Mr. Pochopin, I would like to have you pick up with your
 2 story when you first saw the gray (Idemobile, and describe
 3 for the jury, as best you can, what happened after that?
- 4 A. Yes. After Mr. Carbone and myself lert my vehicle, the
 1969 maroon Chevrolet, we approached the suspects' vehicle,
 which was the 1966 gray Oldsmobile. As we approached the
 car, Mr. Carbone got in the rear right seat, I got in the
 vehicle in the right front seat.
- 9 Q. Were there any other individuals in the vehicle at this
 10 time, sir?
- A. Yes, already in the vehicle was Leonard Johnson, who was driving -- behind the wheel in the driver's seat, of the front seat, the left front, and Leroy McClamb was in the left rear of the vehicle.
- 15 Q. Now, sir, the two gentlemen you just referred to, did you know their names at the time?
- 17 A. I knew of Leorard Johnson.
- 18 Q. You did not know Mr. Mcclamb's name?
- 19 A. No.
- 20 Q. Do you see the two individuals in the courtroom?
- 21 A. Yes.
- 22 Q. Would you identify first Mr. Johnson, the man you said was
- 23 behind the steering wheel?
- A. Mr. Johnson is sitting on the near side of the defense table, wearing a light blue jacket.

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- 1 Q. And would you describe for us, if you can, the man you
 2 said was sitting in the left rear seat that you later learned
 3 to be Mr. McClamb?
- 4 A. Mr. McClamb is on the far side of the defense table, wearing the black jacket and the light blue shirt.
- 6 MR. WAGNER: Let the record reflect that Mr. Pochopin has identified the defendants, Mr. Johnson and Mr. McClamb, respectively.

9 BY MR. WAGNER:

- Q. Mr. Pochopin, I would like you to pick up and describe for the jury what happened after you got in the car, as best you recall.
 - After -- when I entered the vehicle, after general conversation and introductions, Leonard Johnson asked if I had the money. I subsequently told him that I had it, I didn't have it on my person, I left it in my vehicle which was in the parking area. I asked if he had the Treasury checks and he caid -- he didn't really come out with yes he did or no he didn't, he just said, "Ecw much do you have?" I told him, "I've got approximately \$1,000." At this time I mentioned how many checks did he have, and he advised that he had approximately twenty checks which amounted to eighteen hundred to two thousand dollars, and that he was selling them -- or he was charging fifty percent of the face walks of the checks. We argued about the price being too high.

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I asked how old the checks were, and he said they were dated the first of the month, which was the 1st of October. I asked if he had the checks, and at this time he turned around to Mr. McClamb and said, "No's okay, show him the checks."

Mr. McClamb reached into his belt or his side pocket or underneath his jacket and pulled out a yellow-brown envelope and handed it up to the front seat, handed it to me.

- Q. Would you continue on, what did you do at that time?
- A. Yes. I received the package or the envelope, and I opened
 the envelope, and there were Treasury checks in the envelope.
 I roughly counted the checks, and I came to a quick count
 of twenty-one, which is the total amount there were.
- 13 Q. I show you what has been marked Government's Exhibit 32

 14 for identification, and I would like you to look at that

 15 and identify that for the jury, if you can, please.
- 16 A. Yes, this is the yellow envelope that Mr. McClamb handed
 17 me that contained the Treasury checks.
- 18 Q. And how do you know that is the same envelope he handed you that day?
- 20 A. It has A. Victor & Company on the envelope, it has my
 21 initials and the date.
- 22 Q. When did you put your initials and the date on there?
- 23 A. On that date, 10/7/75.

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Q. Showing you Government's Exhibit 1(c) for identification,

I would like you to look at that and tell us what that is,

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1 if you know. 2 Yes, this is one of the 'treasury checks that was in the 3 yellow-brown envelope. Can you tell us, sir, how you know that is the same Treasury 4 0. check that was in the envelope that day? My initials and the date are on the reverse side of the 7 check. 8 Can you tell us, sir, what the name of the payee and the 9 address and the amount of the check is, and the date? 10 A. Made payable to Marie Jennings, 286 Purdy Street, Buffalo, 11 New York, in the amount of \$218.55, dated 10/1/75. Q. Okay. Showing you Government's Exhibit 2(c) for identifi-12 13 cation, again I would like you to tell us the same thing 14 about that check. 15 A. Made payable to Lottie Fowler, 320 Purdy Street, Buffalo, 16 New York, in the amount of \$28.85, dated 10/1/75. 17 Q. Do you recognize that Exhibit 2(c) as one in the envelope 18 that day? 19 Yes. 20 10. How is that?

On the reverse of it it has my initials and the date, which

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It has my initials and date on the reverse of it.

Showing you Government's Exhibit 3(c) for identification.

This check is made payable to Dock Daniels, 315 Purdy Street,

Buffalo, New York, in the amount of \$601.15, dated 10/1/75.

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21 A.

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1		after the transaction was made I did date and initial all
2		these checks at the Buffalo field office.
3	c.	Showing you Government's Exhibit 4(c) for identification.
4	A.	This check is made payable to Marie McElrath, 328 Purdy
5		Street, Buffalo, New York, in the amount of \$50.40, dated
6		10/1/75, with my initials and the date on the reverse of
7		the check.
8	ο.	Showing you Government's Exhibit 5(c) for identification.
9	Α.	This check is made payable to Lemon F. Houston, 246 Furdy
10		Street, in the amount of \$116.75, dated 10/1/75, and on
11		the reverse side my initials and the date.
12	٥.	Showing you Government's Exhibit 6(c) for identification.
13	Α.	This check was made payable to S.G. Fendleton, 214 Purdy
14		Street, Buffalo, New York, in the amount of \$65.00, dated
15		10/1/75, and I have dated and initialed the reverse of this
16		check.
17	Q.	Again with Government's Exhibit 7(c) for identification.
18	A .	Made payable to Thelma M. Anderson, 282 Purdy Street,
19		Buffalo, New York, in the amount of \$47.25, dated 10/1/75,
20		with my initials and the date on the reverse of the check.
21	THE	CCURT: One thing that is not being said, and I am not
22		trying to run your case, Mr. Wagner, but I
23		assume in each instance that the checks you have
24		been talking about were in the envelope?
25	THE	WITHESS: Yes, these are the checks that were in the

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1		envelope.
2	THE COURT:	As a matter of fact, to cat through this, there
3		were a whole bunch of exhibits which were in
4		the envelope?
5	THE WITNESS;	Yes.
6	THE COURT:	What are those exhibits, Mr. Wagner?
7	MR. WAGNER:	Mr. Pochopin, I will ask you to leaf through them -
8	THE COURT:	Tell the exhibit number and say whether it was
9		in or not in the envelope.
10	THE WITNESS:	Exhibit 8(c) was in the envelope. Exhibit 9(c)
11		was in the envelope. Exhibit 10(c) was in the
12		envelope. Exhibit 11(c) was in the envelope.
13		Exhibit 12(c) was in the envelope. Exhibit
14		13(c) was in the envelope. Exhibit 14(c) was
15		included in the envelope. Exhibit 15(c) was
16		included in the envelope. Exhibit 16(c) was
17		in the envelope. Exhibit 17(c) was in the
18		envelope. Exhibit 16(c) was in the envelope.
19		Exhibit 19(c) was in the envelope. Exhibit
20		20(c) was in the envelope and Exhibit 31(c) was
21		also included in the envelope.
22	THE COURT:	Are they all Treasury checks?
23	THE WITNESS:	They are all Treasury checks, yes.
24	BY MR. WAGNER:	
25	Q. Are they a	ll dated the same day, sir?

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	А.	All twenty-one	of the Treasury	checks	that	I	jost	worlt	over	
2		were all dated								

THE COURT: These were all in an envelope you say you get from Mr. McClamb?

5 THE WITNESS: Yes, sir.

6 BY MR. WAGNER:

Q. Did you take the envelope and look at the checks at what time, sir?

handed me the envelope with the checks, I took the checks out of the envelope, counted them, and on quick count I counted twenty-one of the checks. After counting the checks, we discussed the price further, which I continue to say was just too high, to be paying \$1,000 for \$2,000 in Treasury checks. After further general conversation, I wanted to estimate the total face amount, and so I started to add these up and estimate the amount, when Mr. McClamb -- Mr. Johnson, I'm sorry-- Mr. Johnson adviced the reason the price was so high was because there was a small quantity of checks here. He said if I was interested the following month --

THE COURT: No, let's not get into that.

22 MR. WAGNER: Your Honor, perhaps I could make an offer of proof:?

THE COURT: Later, yes. Make it later, carry on with the transaction.

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BY MR. WAGNER:

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Ω. Tell us what else you discussed with ir. Johnson or Mr. McClamb at that time, sir.

Okay. After further conversation regarding Treasury checks with Mr. Johnson and Mr. McClamb, I estimated the total value of the checks at about \$2,000. I made a final offer of \$750 to Mr. Johnson, who thought, and he hesitated, looked at Mr. McClamb who nodded his head up and down to me, meaning yes, then Mr. Johnson did say, "Okay, it's a deal." I told him, Mr. Johnson, at this time that I would get the money from my car. Mr. Johnson said to leave the checks in his car, so I placed the checks, which I put back in the envelope, on the back rest of the front seat of the car, and I departed the car, and started to go toward my car, and took maybe four or five steps toward my car and I came back and told Mr. Johnson to follow me over to my car. I started walking to my car, I heard a vehicle behind me, and when I arrived at my car, the trunk area of my car, I turned around and the gray 1966 Oldsmobile was behind me in the middle of the parking lot. I asked Mr. Johnson for the checks so I could put them in the trunk where I had my money. Mr. Johnson at that time -- he noticed the checks were still on the back rest of the front seat of the car at that time Mr. Johnson reached over with his left hand and took the checks and then turned his back to me and gave them to me

- over his right shoulder --
- 2 Q. Go ahead.
- 3 A. -- which I took, and at that time I gave a prearranged
 4 signal and Mr. Johnson and Mr. McClonb were subsequently
 5 arrested by agents of the recret Service and of the Fost
 6 Offfco.
- 7 Q. You mentioned that you gave a prearranged signal, could you explain what the signal was?
- 9 A. The signal was when I put the trunk up --
- 10 Q. You did that?
- 11 A. -- the deal had been consumnated.
- 12 Q. Do you know what agents arrived at that time?
- 13 A. Yes. Special Agent Stephen Patro, Secret Service; James
 14 Husted, Secret Service; Patrick Finnerty, Secret Service,
 15 and Michael Davis, Postal Investigator with the U.S. Post
- 16 Office.

- 17 Q. Can you give us an estimate as to how long it was from when
 18 you raised the trunk to when the other agents got there?
- 19 A. Almost immediately.
- 20 Q. What happened when these agents arrived?
- A. Mr. Johnson and Mr. McClamb were arrested at that time.

 they were handcuffed. Mr. Carbone and myself were put under

 a simulated arrest. We -- all four of ms were taken back

 to the Buffalo office of the Secret Service for processing.

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where myself and Mr. Carbone were taken to a separate area,

and Mr. Johnson and Mr. McClamb were processed and booked.

Q. Po you know what happened to the check: that were handed to you by Kr. Johnson at that time?

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- Yes, when I put the trunk up, or opened the trunk, I placed the envelope in the trunk. I stood by the trunk, and Postal Investigator Mike Davis came to my area. I observed him taking the envelope with the checks in it and keep it in his possession.
- Did you see those checks later at the office then?
- A . Yes. When I was back in the office, Postal Investigator Davis arrived at the office, to where I was, he brought the checks with him, and I observed him take and initial each 12 of the checks and the envelope. At this time Special Agent James Husted was also present, and Mike Davis gave the 14 envelope and the checks to James Husted who, in turn, dated 15 and initialed each of the checks, who in turn handed them 16 to me, and I dated and initialed the checks, and subsequently 17 placed them in a separate compartment of the office safe. 18
 - Do you know if there was any other involvement with those Q. checks, as far as your agency was concerned or other investigative agencies?
- Yes, on October 9, 1975, we sent these checks to our Special 22 Investigation Branch of the Secret Service in Washington for 23 fingerprint examination, along with the fingerprints of Mr. 24 Johnson and of Mr. McClamb. 25

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- 1 Q. Do you know if you got a result from that, either positive or negative?
- A. Yes. On or about December 15th we received the results of
 this minhydrin evaluation, where the people in the Special
 Investigation, the laboratory, attempted to bring out fingerprints of people who have touched the checks.

7 THE COURT: You received a report, right?

8 THE WITNESS: Yes.

9 THE COURT: What was the report?

10 THE WITNESS: The report was that there were no identifiable
11 fingerprints, latent prints, of Mr. Johnson or
12 Mr. McClamb on any of these checks.

13 BY MR. WACKER:

- Q. Were there any prints on there that they could identify?
- 15 A. Yes, they found one of my fingerprints on one of the checks.
- 16 Q. Do you know if there was any handwriting analysis done,
- sir, between the handwriting of Mr. Johnson and Mr. McClamb
 and any writing on the checks?
- 19 A. During processing of Mr. Johnson and Mr. McClamb I was not
- 20 present, but handwriting was taken from Mr. Johnson and Mr.
- 21 McClamb, and on one of the United States Treasury checks,
- 22 the Marine Jennings check --
- 23 Q. Perhaps you should find that check and identify it by 24 exhibit number.
- 25 A. Exhibit 1(c) was the only check out of twenty one that was

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1 signed with the payee's name. The payee's name was signed 2 on the reverse of the check. From my observation and the 3 other agents, the Secret Service agents who took the hand-4 writing, obtained the handwriting from Mr. Johnson and Mr. 5 McClamb, they were not comparable at all. 6 Do you know if the laboratory did a test on that? 7 No, we did not send it down. 8 MR. WAGNER: Your Honor, other than the issue that came up, 9 I have nothing else for Mr. Pochopin. I would 10 like to make an offer of proof. 11 THE COURT: All right. Let me ask the jury to step into 12 my hallway for two minutes while I deal with 13 this. We will bring you right back. 14 15 (Thereupon the jury exited the courtroom at 16 9:40 A.M.) 17 18 Your Honor, I would like to put the question MR. WAGNER: 19 to Mr. Pochopin concerning his conversations 20 with Mr. Johnson in the automobile at that time, 21 and it is my anticipation, your Honor, that Mr. 22 Pochopin will testify that Mr. Johnson advised 23 him when they negotiated the price that the 24 price was high at this time because the amount

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was -- the amount of checks were small, but that

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there would be perhaps a future delivery of checks the following month, Mr. Pochopin could get a better deal on it. Mr. Pochopin responded by saying, 'You give me a good deal on this batch, and I will give you a higher price next month.' The Government submits that this is admissible and relevant for the following reasons. First on all, the fact that Mr. Johnson is conscious of a potential future delivery indicates to the jury, I think, that he has a source, he has some type of source. Now, it is recognized, and I'm sure the defendants will argue, Mr. Johnson and Mr. McClamb must be proved to have knowledge that the checks were stolen rather than merely have it come about through 15 mistake or inadvertence or other innocent reasch. 16 By proving Mr. Johnson has a source for the 17 checks or knowledge of a source for the checks, 18 coupled with the inference that they were stolen 19 from the mailbox, supplies that link in the 20 necessary proof of the Government, and for that 21 reason, I submit it is admissible. It is also 22 admissible, in addition to establishing the link 23 about knowledge of the checks being stolen, to 24 prove that Mr. Johnson had the necessary willful 25

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intent. In other words, Mr. Johnson was not acting out of durens, occreion or fear at the time, but was acting in a conscious, unlawful manner. If, for example, Mr. Johnson was in a harry to provide more milk for his young baby at home and was doing everything possible to gather a few dollars, that might be a defense. Do you think it would be? THE COURT: I think it could be a defensible argument, yes. HR. WAGNER: The defense of duress or perhaps coercion. The defense might be persuasive to the jury, THE CCURT: but certainly it is not a legal defense. I think we are -- perhaps you are right, your MR. WAGNER: Houer. I think he perhaps could make that. Another defense, of course I don't have the 15 luxury of anticipating the defenses at this 16 point, but another defense that he could make 17 is he didn't knew what he was doing, he was 18 not acting knowingly and willfully, and for him 19 to say, 'I can get you checks a month from now," 20 21 establishes a knowing element to his conduct. I would also submit that there is a third 22 23 alternative theory, which would justify it, perhaps at this time, perhaps in a rebuttal 24 mense, that is, the deferse of entrapment. As 25

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the Court knows, and as the defendants, I am sure, will argue, if there is any question that 2 the defendants were trapped into it, and I feel 3 at this time there is no evidence to sustain 4 that charge, but if they should argue that, then 5 the predisposition of the defendant to commit the crime, of course, mocts any Government 7 pressure, any Government inducement to the 8 crime. Obviously, a man saying, 'I can provide 9 you with the same type thing, stolen Treasury 10 checks, a month from now, supplies an element 11 of predisposition. I would suggest, your Honor, 12 that the entrapment testimony however may be 13 more in the nature of rebuttal. I am asking 14 to have Mr. Pochopin testify about it now on 15 the earlier mentioned ground. 16 Your second facet, of course, would be a rebuttal THE COURT: 17 situation also. To you have any comment, Mr. 18 McLeod? 19 MR. MC LECO: Yes, your Honor. In response to Mr. Wagner's argument I would state --21 THE COURT: Deal with the first ground. In other words, this would be an indication of scienter in having 23

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basis I can see at this time.

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a source for the checks. That is the only possible

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MR. MC LEOD:

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At this point in time there has been no indication, and I don't believe that there can be a showing of any indication, simply from that statement that the defendant Leonard Johnson supposedly had any source from which he could derive checks for the agent or anyone else in the future. The statement is simply a blanket one. There is nothing shown to this point in time indicating that there was any available source to this defendant. Two, there has been no showing or indication that the statement was anything more than just that, a statement as to what may happen in the future, something that could never be or may never be, in no way would show that there is any connection or ability on the part of the defendant to produce these checks at this point in time. We are dealing with something in the future, which has not been shown to be within the capabilities of this defendant. I believe that simply allowing the agent to let that statement be known to the jury, the statement which in no way is supported by any proof whatsoever, would be nothing more than a prejudicial statement. I don't believe it is indicative of any ability or scienter on

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1		the part of this young man.
2	MISS BANDSCRU:	I don't know how much standing I have, because
3		I understand you are attributing this to the
4		defendant Johnson?
5	MR. WAGNER:	I will concede she has standing.
6	THE CCUFT:	This was in the presence of Mr. McClamb.
7	MISS HANDSCHU:	In the presence of any defendant, my instinct
8	and the second second	tells me, and I am sure weighing this, I would
9		think, on the balancing test, a statement as
10	·	to future conduct where it could not be possible
11		for the defendant Johnson to do it on October 7th,
12		hypothesizing about the future, would so badly
13		outweigh any probative value of the statement,
14		I think that in the very traditional sense the
15		jury could be highly prejudice by such a state-
16		ment that has such an open time span and cannot
17		he done at that particular moment. I don't
18		think that any one of the three of us would argue
19		that on October 7th Mr. Johnson was saying, 'I
20		have November 1st checks in my hand.
21	MR. MC LECD:	If there were some showing parhaps that he has
22		done it in the past
23	THE COURT:	Let me hear from Mr. Wagner.
24	MR. WAGNER:	I cannot possibly disacree with Miss Handschu
25		and Mr. McLeod that it is impossible to prove

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THE COURT:

MR. WAGNER:

that they could fulfill that prediction, that is a truism. Of course, it is impossible because the November checks hadn't beck printed. It seems to me that the fact that a defendant who is charged with having in his possession checks that he knew were stolen, and who says to the undercover agent, 'I can provide you with mone checks next month, ' shows clearly that he had a knowing -- a knowledge of some way of getting them. The jury is permitted to infer, and Miss Handschu and Mr. McLecd are permitted to argue that the jury should not consider that, but we are talking about its admissibility. For Miss Handschu to claim it is prejudicial is a paradoxical statement by her in the sense --If it weren't the Government wouldn't be putting it in. The Government's entire case is prejudicial to the defendants. The fact these men made the statement -- I don't want to sound crude -- but they must live with the statements they made. The fact they gave a damaging comment to the agent at the time of the transaction is the penalty they must pay for having said it. If Miss Handschu or Mr. McLeod wants to argue

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	against it, they are permitted, but the jury
	should hear it, it is relevant, it is admissible,
	and I think under the rules its value comes in
	for the argument the attorney can make.
MR. MC LECD:	Your Honor, there has been no showing through
	this witness that there was any prior activity
	of this sort committed by the defendant to show
	that perhaps he has done it before, he is doing
	it now, he will be able to do it again in the
	future. The statement which I believe the wit-
	ness is going to state is simply a circumstantial
	statement that is an inference upon an inference
	that these checks were stolen. There has been
	no indication that these checks were stolen
THE COURT:	It is not an inference upon an inference.
MR. WAGNER:	There is evidence they were stolen.
THE COURT:	The testimony would be straight out eyewitness
	direct evidence as to a statement made by the
	by defendant from which inferences would be
	drawn. It is not an inference upon an inference.
MR. ME LEGD:	Lastly, I would simply state that inasmuch as
	it is a statement dealing with something totally
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	beyond what the charge is before this Court, we
	beyond what the charge is before this Court, we are not dealing with the supposed future act
	THE COURT: MR. WAGNER: THE COURT:

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1		with the supposed past act on the part of the
2		defendant, we are talking about what he supposedly
3		did that day in connection with these checks.
4	THE COURT:	A big part of which is criminal knowledge and
5		intent.
6	MR. MC LECE:	Dased on actions he may have commissed, not
7		actions he possibly was going to commit in the
8		future.
9	MR. WAGNER:	Indications from his mouth indicating his state
10		of mind, his knowledge and intent.
11	MR. MC LECD:	I don't believe there is a supportive basis to
12		allow that statement to come in. I would
13		certainly rest on the fact that it would be
14		nothing more than a prejudicial statement, even
15		though it was supposedly made by the defendant.
16		it could possibly allow the jury to take that
17		into consideration, supposed future acts, rather
18		than the acts which supposedly were committed
19		by him schetime between the 1st of October and
20		the date of his arrest, October 7, 1975. I
21		think we should limit ourselves to that point
22		in time. Anything else would be well it
23	714	is something we shouldn't be allowed to deal
24		with.
25	THE COURT:	Well, I will allow it. In due time, of course,

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1		I will indicate to the jury that obviously all
2		we are concerned with is this transaction, it
3		has no import as far as any future or separate
4		criminal acts, and it is only to be considered
5		in deciding upon the state of mind and intention
6		of the defendants at this time and for this
7		purpose.
8	MISS HANDSCHU:	I take exception to the Court's ruling for the
9		defendant McClamb. And I would also ask, your
10		Honor, if our request to charge don't cover this
11		area, will the Court
12	THE COURT:	I will put that in, but if you have some specific
13		language you want in, you only get it in by hand-
14		ing up a request, and then we can deal with your
15		request. You can rely on my putting it in or
16		ask me to put it in.
17	MISS HANDSCHU:	We are asking at this time if
18	THE COURT:	Cive no senething, I don't care about the form,
19		write it out in longhand. Do it during this
20		afternoon, I am not going to be here.
21	MR. FC LECD:	I would like the record to note an exception on
22		ty part.
23	THE COURT:	It is noted.
24	MR. AC LEOD:	All right.
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(Thereupon the jury returned to the courtroom at 9:55 7.E.)

McClamb and --

BY MR. WAGNER:

- Q. Er. Pochopin, earlier you were mentioning conversations you had with Er. Johnson in the automobile --
- THE COURT: While you were negotiating.

8 BY MR. WAGNER:

- Q. -- while you were negotiating with him. Could you tell us, sir, what else you said to Mr. Johnson, and what else he said to you, as best you recall?
- A. Yes. We were arguing about the price of the checks being fifty percent, with myself saying that is just too high to pay \$1,000 for \$2,000 worth of checks. He advised that the reason the price was so high was because there was a small quantity of checks involved. He at this time advised that if I were interested the following month, on or about the first part of November 1975, he would have a much larger package and the percentage would be much lower, if I were agreeable to this fifty percent at this point in time. I at this time teld him I may be interested in future purchases, but in order to show good faith on both sides that I requested I give him a \$750 payment for approximately \$2,000 in Treasury checks. At this time Mr. Johnson turned around to Mr.

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1	THE COURT:	You have come to a point that you have already
2		covered.
3	THE WITHESS:	Yes.
4	MR. VAGNER:	Thank you very much. I have no further questions.
5		I would like at this time to move into evidence
6		the envelope and the checks, Covernment's Exhibit
7		32 and Government's Exhibit 1(c) through 20(c)
8		and 31(c).
9	THE COURT:	What about the offer?
10	MISS HANDSCHU:	No objection.
11	MR. MC LECD:	No objection, your Honor.
12	THE COURT:	All right, there being no objection. I will
13		receive the envelope and the twenty one checks
14		in evidence.
15		
16		(Thereupon the Government's Exhibit 1(c) through
17		20(c), 31(c) and 32, premarked for identification,
18		were received and marked in evidence.)
19	•	
20		(Thereupon Defendant's Exhibit 2 was marked for
21		identification.)
22		
23	CRCS EXAMINATI	CN EY MISS FALESCEU:
24	Q. Mr. Pochopi	n, am I saying it correctly?
25	A. Yes, you ar	c.

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Court's Instructions to the Jury.

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 3:20 P.

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(Defendants present, counsel present, jury present.)

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THE COURT:

CHARGE OF THE COURT

Now, ladies and gentlemen, it is my serpon sibility to give to you the principles of law which will govern your deliberations and your determination in the case, and I recite what the attorneys have told you, and I have told you before, that of course it is your primary duty to determine the facts, and you are the only ones that are going to determine the facts and I don't know if I am going to make any reference to any facts, the atterneys have, but if I do it is merely for the purpose of helping you to understand some of the principles of law that I am going to give to you.

In any event, as I said, anything the attorneys said in their arguments or at any other point in the trial or anything that I may say concerning the facts which conflict at all with anything that you remember the facts to be and the manner in which you remember them,

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you take your own recollection as being the controlling factor.

The indictment has been read to you both by Mr. Magner and Mr. McLeod, and I also will briefly refer to it. It will come to you in the jury room as court Exhibit A, and you will see therein that there is a listing of twenty one separate checks and amounts and payees, which you will have before you. The rest of it is quite simple and direct, and it says that on or about the 7th day of October 1975, in the Western District of New York -- the Western District of New York being those seventeen counties that are in this end of New York State, including Erie County, the defendants, Leonard Johnson and Lercy McClamb, unlawfully had in their possession the following United States Treasury checks, all of which were dated October 1, 1975, as follows -- then we have the listing -- which checks bad been stolen from the mail, well knowing the said checks had been stolen; all in violation of Title 18, United States Code, Section 1708 and Section 2. I told you before and again I tell you that, of course, the indictment itself means nothing, it

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is not any kind of evidence. It is merely a piece of paper, a forwal method by which we bring the case into court, and we tell the defendants what crime they are charged with. It is not evidence of any kind against them.

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Now, I mentioned Section 1708 -- or rather the indictment refers to that section, and the pertinent portion of that is as follows: "Whoever unlawfully has in his possession any letter, package, bag or mail or any article or thing contained therein which has been stolen, taken or abstracted from or out of any mail letter box, mail receptable, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, knowing the same to have been stolen, taken or abstracted is guilty of an offense against the laws of the United States."

I talked initially, and the attorneys have talked, of elements of a crime, and I tell you that there are three essential elements that the Government has the burden of proving beyond a reasonable doubt — that is a phrase that I will use often, and I will ultimately define it for you — three essential elements must be so

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shown before the offense charged in the indictment can be deemed to have been established, and the first one of these is that the defendants, Leonard Johnson and Loroy McClamb -- and I put that together jointly, but I will tell you further, as the attorneys have told you, that you will be weighing the guilt or innocence of each of those defendants separately -- the defendants, Leonard Johnson and Leroy McClamb, unlawfully possessed the Treasury checks described in the indictment. The second element is that the checks were actually stolen from the United States mail. There is no allegation that Mr. Johnson or Mr. McClamb stole them, but you must find as one of the elements that the checks in fact had been stolen from the mail. Third, that the defendants -again I use the plural, you will be weighing it as to each one -- know the checks had been stolen, not from the mail, but had been stolen, and you will note that there is no requirement on the Government to prove that the defendants or a particular defendant knew that the Treasury checks had been stolen from the mail, but only that they knew they had been stolen. Again, the burden is always on the Government, the

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prosecution, to prove beyond a reasonable doubt each of those essential elements, and the law never imposes upon either defendant in this or any other criminal case the burden or duty of calling any witness or producing any evidence.

The statute and the indictment and the elements talks of possession. In the law in this type of case for this purpose there are two kinds of possession; actual possession and constructive possession, and a person who knowingly has direct physical control over a thing at any given time is said to be in actual possession of it. A person who, not in actual possession, knowingly has both the power and the intention at that given time to exercise dominion and control over a thing, either directly or through another person, is said to be in constructive possession of it, and the law also recognizes that possession can be sole or joint, and if one person alone has actual or constructive possession of a thing, then possession is sole. If two or more persons share the actual or constructive possession of the thing, then possession is joint. You may find that the element of possession, as that

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term is used in these instructions, is present if you find beyond a reasonable doubt that a defendanc, etc whose guilt or innocence you are considering, had actual or conscructive possession, either alone or jointly with another or others.

Now, an act or failure to act is knowingly done, and I have used that term, if it is done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

I have also used the term "unlawfully" and that means contrary to law. So to do a thing unlawfully means to do willfully something that is centrary to law.

Stolen has the usual connotation, the usual meaning, it means acquired or possessed as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another without or beyond any permission that is given, and with the intent to deprive the owner of the benefits of his ownership.

I have used the term "willfully" and that means that an act is done voluntarily and intentionally, with the specific intent to do

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bad purpose either to discover or disrogard the

Stoles from the sail, that expanded phrase actains accounted or possessed as a result of willfully taking or obtaining any letter or other sail satter from or out of any sail post office, letter box, sail receptable, sail route or other authorized depository for sail matter, or from a letter or sail carrier, or willfully removing from a letter or other sail matter any article or uning contained therein.

Now, actual knowledge that the Treasury checks were stolen or unlawfully taken is an essential element of the offense. The Government is required to prove that the defendant, whose guilt or innocence you are determining, knew that one Treasury checks were stolen, but not necessarily that he knew the checks were stolen from the mail. You may not find such defendant guilty unless you find beyond a reasonable doubt that he knew that the Treasury checks had been stolen. It is not sufficient to show that he may have suspected or thought that the checks were stolen. The fact of knowledge,

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however, may be established by direct or circumstantial evidence, which I will tell you more about later, just as any other fact in the case can be determined by you.

Now, in velgaing the evidence which you have before you in this trial, you can consider the cirsumstances, ir you find it is established beyond a reasonable doubt, that a defendant had possession of the Treasury checks recently after they were stolen from the mail, as is alleged in the indictment. Possession of recently stolen property, if not satisfactorily explained by other evidence, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by all of the evidence, that a defendant who had possession of the checks knew that they had been stolen. However, you are not required to make this inference, and you alone are to outermine whether the facts and circumstances shown by the evidence warrants any inference which the law permits you to draw from the possession of recently stolen property. The possession of recently stolen property by a defendant does not shift the Lurden of proof.

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The burden is always on the Government to prove bovend a reasonable doubt every essential element of an offense as to each defendant.

The term "recently", as I have used it, is a relative term, it has no fixed meaning. Whether property may be considered as recently stolen property depends upon the nature of the premerty and all of the facts and circumstances shown in the evidence in the case. The longer the period of time since the Treasury checks were stolen, the more doubtful becomes the inference which may reasonably be drawn from unexplained possession. If you should find beyond a reasonable doubt from the evidence in the case that the Treasury checks described in the indictment were stolen from the mail, and that they were in the actual or constructive possession of the defendant, whose guilt you are determining, recently after they were stoleh, you may from those facts draw the inference that the checks were possessed by that defendant with knowledge that they were stolen, unless such possession is explained to your satisfaction by other evidence in the case and by logical inferences therefrom.

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Now, in considering whether a delendant's possession of recently stelen property has been satisfactorily explained, you must bear in mind that a defendant is not required to take the witress state or furnish any explanation. Possession ray be satisfactorily emplained through other circumstances, other evidence and inferences therefrom, independent of any testimeny of the defendant or any evidence adduced by a defendant. I emphasize again that the law never imposes upon a defendant in a criminal case the burden or duty of being a witness, calling any witnesses or producing any other evidence. Even though a defendant's possession of recently stolen property is unexplained or is not satisfactorily explained, you cannot draw the inference under consideration of on the evidence as a whole you have a reasonable doubt as to his guilt. As I have said earlier, the Government must prove beyond a reasonable doubt that the defendant, whose quilt or innocence you are weighing, had actual knowledge that the Treasury checks were stolen. An inference of the existence of this knowledge may be draw from evidence that such defendant

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was aware of a high probability that the checks were stolen, unless you find that he actually believed that the checks were not stolen. The element of knowledge may be satisfied by inferences drawn from proof that he deliterately and intentionally closed his eyes to facts which would have otherwise been obvious to him. If you find from all the evidence beyond a reasonable doubt that he had a conscious purpose to avoid learning the source of the Treasury checks, you may infer that he knew that the Treasury checks were stolen. I emphasize, however, that this requisite knowledge cannot be established by demonstrating merely negligence or even

Now, we have multiple defendants in the case, there are two defendants, and I have indicated already that you will separately weigh and determine the evidence as to the crime charged in the indictment, and you will determine the guilt or innocence of Mr. Johnson and of Mr. McClamb separately. However, in a case where two or more persons are charged with the commission of a crime, the guilt of any defendant may be established without proof that he personally

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foolishness on his part.

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did every act constituting the offense charged.

You will remember that as I read the indictment
there is a reference to another section of the
Criminal Code, namely Section 2, and that reads:
"Whoever commits an offense against the United
States or aids, abets, counsels, commands,
induces or procures its commission is punishable
as a principal." In other words, every person
who willfully participates in the commission of
a crime may be found to be guilty of that
offense.

Participation is willful if it is done voluntarily and intentionally, and with a specific intent to do something that the law forbids, that is to say, with a bad purpose, either to disobey or disregard the law. In order to aid and abet another to commit a crime, it is necessary that a defendant willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wants to bring about, that is to say, that he willfully seek by some act or emission of his to make the criminal venture succeed.

You, of course, may not find a defendant

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guilty unless you find beyond a reasonable doubt that every element of the offense, as defined in these instructions, was committed by some person or persons, and that the defendant, namely, the defendant whose guilt or innocence you are considering, participated in its commission. Mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant aided and abetted the crime, unless you find it beyond a reasonable doubt that such defendant was a participant and not merely a knowing spectator.

Each defendant is entitled to have his guilt or innocence as to the offense charged determined from his own conduct and from the evidence which applies to him, as if he were being tried alone. The guilt or innocence of one defendant of the crime charged should not influence your verdict respecting the other defendant except, of course, as I have muntioned, you may not convict a defendant of aiding or abetting a crime unless you find that someone, the other defendant or someone, committed the crime. You may find any one or both of the defendants guilty or not

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guilty but, nevertheless, you must relate the evidence only as to the defendant toward whom it is received and, in any event, as I say again, you must determine the guilt of each defendant by giving separate consideration to the evidence which applies to him.

I mentioned that you are the sole judges of the facts, and in that connection you must determine which of the witnesses you believe, and what portion of their testimony you accept, and what weight you attach to it.

At times during the trial I sustained objections to questions which were asked without permitting the witness to answer, and I tell you that you may not draw any inference from an unanswered question. The law requires your decision to be made solely upon the competent evidence before you, and any such items that I have excluded from your consideration are not legally admissible and must not be considered.

You are also the sole judges of the weight that you are going to assign or give to the testimony of the different witnesses. Some of the evidence in the case may to you be more believable, more credible than other evidence,

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and the matter of the credibility of the witnesses you have heard is one of the questions of fact which you must take into consideration in arriving at your verdict, and you are entitled to and you should utilize in this connection your observation of the witnesses as they appeared before you, and your own experience in your respective lives in deciding when somebody is telling the truth. You may find that one witness was a better observer, had a more accurate memory or was otherwise more reliable than other witnesses. You may take in to consideration in evaluating the testimony the demeanor of the witness on the stand, and the interest or lack of interest which he has in the outcome of the litigation. If you find that a witness testified falsely concerning any material matter, you have a right to discount his entire testimony or you can take from the testimony that which you believe and disregard or discard that which you find to be not true. A witness knowingly testifies falsely if he testifies intentionally and not because of mistake or other innocent reason.

There are certain rules of law, some of which I have already mentioned, which are common

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to all criminal cases, and which you must apply in reviewing the evidence. A basic rule in all criminal cases is that the defendant is presumed to be innocent, and that presumption of innocence remains with each defendant throughout the trial, and it continues to exist until such time as each of you is convinced beyond a reasonable doubt by legal and competent evidence that the defendant is guilty of the offense charged.

The burden of proof that person is guilty beyond a reasonable doubt rests with the Government at all times, it never shifts to a defendant. In order to sustain its burden, the Government must present proof which is sufficiently strong to convince each of you of each defendant's quilt beyond a reasonable doubt. The requirement that the prosecution prove a defendant's guilt beyond a reasonable doubt extends to every essential element of the crime charged, as I have enumerated them. However, in determining whether the guilt of a defendant has been established beyond a reasonable doubt, you are not limited to the proof from the Government's witnesses because you have the documentary evidence before you also. In other words, you

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are not limited to what came from the lips of the witnesser, you review all of the evidence in the case, both the Covernment's and what the defendants have been able to bring out by their cross examination, and what you find in the documents before you. If you are satisfied from a review of all of that evidence that the evidence establishes guilt beyond a reasonable doubt, you may convict the defendant. On the other hand, if you have a reasonable doubt at any point with respect to guilt, you must acquit the defendant, you must declare him not guilty. Again, you separately weigh and determine the guilt or innocence of each defendant as to the crime which is charged.

I mentioned reasonable doubt and I promised to define it for you. A reasonable doubt is a fair doubt, which is based upon reason and common sense, and which arises from the state of the evidence. Of course, it is rarely possible to prove anything to an absolute certainty. So proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely upon or act upon in the most important of your own alfairs. A defendant is not to be

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convicted on mere suspicion or mere conjecture. A reasonable doubt may arise not only from the evidence which has been produced in the case, but also from a lack of evidence. Because the burden is upon the prosecution, to prove each defendant's guilt beyond a reasonable doubt of every essential element of the crime, each defendant has the right to rely upon the failure of the prosecution to establish such proof. The defendant may also rely upon evidence brought out on cross examination of the witnesses which the prosecution has produced. Again, and I reiterate, that the law does not impose upon a defendant the duty of producing any evidence. Now, remember that a reasonable doubt is such a doubt as is based upon reason and as appeals to your power of logic. It is a doubt which arises out of something tangible in the case or something lacking in the case. It is to be distinguished from a doubt which might be based upon some emotion, such as a whim or fancy or a feeling. If you feel uncertain and not fully convinced that a defendant is guilty of the crime charged, and you believe that you are acting in a reasonable manner, and you believe

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a reasonable man or woman in any matter of like importance would hesitate to convict because of such a doubt as you have, that is a reasonable doubt, to the benefit of which a defendant is entitled. If you have such a doubt, you must acquit. As I stated before, a reasonable doubt in your mind as to any essential element of the crime entitles the defendant to acquittal of the crime and entitles him to be judged not guilty. However, the rule that the Government must prove every essential element of the crime beyond a reasonable doubt does not mean that you must believe the testimony of every Government witness as being true beyond a reasonable doubt or that every piece of evidence that has been offered is true beyond a reasonable doubt. It only means that the credible evidence as weighed and found by you, under these instructions, and viewed as a whole, must establish every essential element of the crime and each defendant's guilt beyond a reasonable doubt.

I mentioned that there are two types of evidence, direct and circumstantial, upon which you can rely to find a defendant guilty of an offense or in weighing the guilt or innocence

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of a defendant as to an offense. Proof may consist of the testimony of those who witnessed the defendant's conduct and who testified to that conduct in the course of the trial. This is called direct evidence or eyewitness evidence. Although the Government may not be able to produce eyewitnesses to the conduct on which guilt depends, this does not mean that it cannot produce proof sufficient to support a verdict. You are entitled to draw from one fact the existence of another, if reason and experience support the inference, that is to say, you may draw from facts which you find to have been proven such reasonable inference or inferences as seem justified in reason and logic in light of your own experience in life.

Now, proof of a chain of circumstances pointing to the commission of an offense by a defendant is termed circumstantial evidence.

For example, if you go to bed of an evening and there is no snow on the ground, and you wake up the next morning and there is a blanket of snow you have no direct knowledge or evidence that the snow fell, but you certainly have circumstantial evidence that the snow fell during the

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night. You may, of course, consider and find that both tyces of evidence, both direct and circemstantial, hearing upon the innocence or quilt of a defendant are present in the case, and you can consider both types. The law makes no distinction between oirect and circumstantial evidence, but it simply requires that before you convict a defendant you be satisfied of his guilt beyond a reasonable doubt.

I mentioned inferences, and you may rely on proper inferences, and basically an inference is nothing more than a deduction or a conclusion which reason and common sense lead you to draw from facts which have been proven. Any inference which you draw from the evidence must reasonably flow from and be based upon facts established by the evidence, and because a permissible inference in law must flow naturally and logically from and be based upon facts established by the evidence, it follows that you may not base further inferences upon inferences already drawn. One inference may not be based upon or drawn from another inference, it must be based upon the evidence. If in the course of your consideration of all of the evidence as to a

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defendant, you find certain evidence admits equally of two inferences, one supporting innocence and the other supporting guilt, you must accept the inference supporting innocence and reject the inference supporting guilt.

Now, intent is the purpose or aim or state of mind with which a person acts or fails to act. Ordinarily we very properly infer that a person intends the natural and probable consequences of acts done or knowingly admitted to be done, and so in the absence of evidence in the case which leads you to a different or contrary conclusion, you may draw the inference and find that any person involved intended such natural and probable consequences as one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by such person. Now, an act or failure to act is knowingly done if it is done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. Again, intent may be proved by indirect or circumstantial evidence and, as Mr. Magner pointed out, you cannot take the top of one's head off and

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look inside and see what is in there in the way of intent, you must depend upon indirect or circumstantial evidence, and while witnesses may see and hear and be able to give direct evidence of what a person does or fails to do, there cannot be any eyewitness account of the state of mind with which acts are done or not done. What a person does or fails to do can indicate to you either intent or lack of intent to act or fail to act. Unless otherwise instructed, in determining any issue involving intent, you may consider the facts and circumstances in evidence in the case which aid you in your determination of the state of mind.

You are instructed as a matter of law that you are not to be influenced by the fact that the Government of the United States is a party to this action — the Government is the prosecutor, the Government agents have testified — for I charge you that the Government is to be considered the same as any other party, and that its attorney is to be considered as any other lawyer would be considered, and that the Government agents are to be considered the same as any other witness.

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It is your duty merely to determine the guilt or innocence of each defendant. You are not to concern yourselves with any punishment that a defendant may receive if convicted. That is a matter with which I would be concerned if a defendant should be convicted by you of the crime charged.

I have told you that a defendant in our courts has no obligation to give any evidence, and I tell you that you are not to draw any inference from the failure of the defendant in this case to take the stand. A defendant has the right to go to you, the jury, on the contention that the evidence of the prosecution is insufficient to warrant his conviction under these rules of law.

Now, there will be two verdicts on the single count, you will have a verdict of guilty or not guilty for each defendant on the charge in the indictment. These verdicts have to be reached unanimously, with all twelve of you agreeing on the result. You can find one or both of the defendants quilty as charged, or one or both not guilty, or one guilty and the other not guilty. It is your duty to give separate

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personal consideration to the case of each defendant, and when you do so, you should analyze what the evidence in the case shows with respect to that individual. Each defendant is entitled to have his case determined from the evidence as to his own acts and conduct and any other evidence in the case which may be applicable to him.

I mentioned that I am sending a copy of the

I mentioned that I am sending a copy of the indictment to the jury room for your reference, that has been marked Court Exhibit A. I emphasize again that the indictment is not evidence, it is merely the device we use to tell the defendant what the charges are, and you are not to consider it as proving or tending to prove anything whatsoever.

New, finally, I remind you of the oath each of you took as you were sworn as jurors and promised that you would well and truly try the issues in this case and a true verdict give herein according to the evidence, so help you God. I suggest to you or remind you that if you follow that oath and you try the issues without combining your thinking with any emotions, that you will arrive at a true and just verdict.

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It must be clear to you that if you get into an emotional state, and if you let bias or sympathy or prejudice interfere with your thinking, you won't arrive at a true and just verdict. As you deliberate, ladies and gentlemen, please be careful to pay attention to the views and listen to the opinions of the other jurors, and ask for an opportunity to express your own views. No single juror holds center stage in the jury room, and no juror monopolizes the deliberations. If after you listen to the other jurors, and if after stating your own view, you become convinced that your view is wrong, do not hesitate because of stubbornness or pride of opinion to change your view. On the other hand, do not surrender your honest convictions just because you are outnumbered. As I have said, your verdict must be unanimous. Each verdict must represent the absolute conviction of each one of you. As you retire to go to the jury room, as the first order of business you should select one of your number to speak for you when you come lack to the courtroom or otherwise get in touch with me. Any communication that you have from the jury room would be

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by a note that you had to the deputy marshal who will be on duty outside the room, and the marshal will see that it gets to me. Don't ask the denuty tarshal any questions about your duties. It wou have any such questions, send me a note. "Iso by a note you can request a clarification of these instructions or a reading of my instructions, or all or part of the testimony of any vitness. Also use a note to tell me when you have reached your verdict or, in appropriate circumstances, when you find yourselves so deadlocked that unanimity is impossible. Never tell we or anyone else how your voting stands at any time, except to say in open court that a verdict or verdicts has been reached unania ously.

how, hiss Eandschu and gentlemen, do you have any requests or exceptions and, if you do, do you want to be heard on those outside the presence of the jury?

HER. WAGNER: I have none, your Honor.

22 MISS HAKESCHU: None.

23 MR. MC LECD: None, your Fonor.

24 THE COURT: All right, thank you. Swear the deputy marshalls.

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Court's Order Regarding Government's Use of Prior
Criminal Convictions to Impeach
Defendant McClamb.

UNITED STATES DISTRICT COURT VESTERN DISTRICT OF NEW YORK

ATEC ATTO

THE UNITED STATES OF AMERICA,

Cr. 75-244

Plaintiff,

MEMORANDUM

LEGNARD JOHNSON and LEROY McCLAMB,

-vs.-

and

ORDER

Defendants.

Defendant Leroy McClamb was indicted along with his codefendant, Leonard Johnson, under 18 U.S.C. \$51702 and 1708 after allegedly stolen United States Treasury checks were found in their possession. The Government has indicated its intention to use two prior convictions of McClamb for impeachment purposes if he should take the witness stand. The first conviction was on April 29, 1963 for Robbery in the Third Degree which under Section 2128 of New York's Penal Law of 1909, then in effect, was punishable by a maximum term of imprisonment of ten years. The second conviction was on February 14, 1974 for Criminal Impersonation which under Section 190.25 of New York's Penal Law is a Class A misdemeanor punishable by a maximum term of imprisonment of one year. Defendant McClamb has moved for a pre-trial ruling barring such utilization of these convictions.

Giving due consideration to the affidavit and memorandum submitted in support of this motion, I nevertheless deny the motion of defendant Leroy McClamb to suppress the use of the 1968 and 1974 convictions. See <u>Dnited States</u> v. <u>Puco</u>, 453 F.2d 539 (2d Cir., 1971), and <u>United States</u> v. <u>DeAngelis</u>, 490 F.2d 1004 (2d Cir., 1974), cert. denied 416 U.S. 956 (1974).

The 1968 conviction is admissible under Rule 609(a)(1) of the Federal Rules of Evidence inasmuch as I find that probity re McClamb's credibility would outweigh prejudice to him -- only slightly, admittedly. The 1974 conviction is admissible under Rule 609(a)(2) which neither requires nor allows such weighing inasmuch as it involved dishonesty or false statement.

So ordered.

Dated: Buffalo, N.Y. March 26, 1976

st John Sefun

90 Indictment.

In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-VS-

LEONARD JOHNSON AND LEROY MC CLAMB

MARCH 1975 SESSION TAM (Convened 5/27/75

No.

Vio. T. 18, U.S.C., §§1708 and 2

CC 75-244

COUNT I

The Grand Jury Charges:

On or about the 7th day of October, 1975, in the Western District of New York, the defendants, LEONARD JOHNSON and LEROY MC CLAMB, unlawfully had in their possession the following United States Treasury checks, all of which were dated October 1, 1975, as follows:

	NO.	TMUOMA	PAYABLE TO
1.	53,757,542	\$218.55	Marie Jennings
2.	53,756,987	28.85	Lottie Fowler
3.	80,048,011	601.15	Dock Daniels
4.	28,655,595	50.40	Marie McElrath
5.	7,010,547	116.75	Lemon F. Houston
6.	31,573,003	65.00	S. G. Pendleton
7.	31,573,010	47.25	Thelma M. Anderson
8.	53,757,621	64.15	Lula B. Daniels
9.	53,757,140	112.95	Susie B. Hooker
10.	53,757,190	64.45	Vane Saunders

	NO.	AMOUNT	PAYABLE TO
11.	7,010,492	\$114.38	Virginia E. Carothers
12.	53,756.885	44.20	Ruth Miller
13.	53,576,713	50.95	Josephine Ferguson
14.	7,112.922	109.65	Idella Pope
15.	53,757,472	5.25	Lola Woollard
16.	53,756,982	87.98	Frances Baynard
17.	53,757,318	5 7. 38	Carrie Dobson
18.	53,756,773	86.15	Emmie Tucker
19.	29,142.794	35.00	Andrew Griffith
20.	28,168,022	129.56	Norwood Jenkins
21.	53,757,699	53.78	John Moore

Which checks had been stolen from the mail, well knowing the said checks had been stolen; all in violation of Title 18, United States Code, Sections 1708 and 2.

> RICHARD J. ARCARA United States Attorney

A TRUE BILL:

AFFIDAVIT OF SERVICE BY MAIL

RE: U.S.A. Leonard Johnson & LeRoy McClamb State of New York) No. 76-1544 County of Genesee) ss.: City of Batavia Leslie R. Johnson duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York. February On the 17th day of in Brief & Appendix copies of a printed Appellee the above case, in a sealed, postpaid wrapper, to: 10 copies (by Air Mail) to: A. Daniel Fusaro, Clerk United States Court of Appeals, Second Circuit New Federal Court House Foley Square New York, New York 10007 2 copies to: Barbara Ellen Handschu, Esq. 318 Brisbane Building Buffalo, New York 14203 2 copies to: James McLeod, Esq. 1340 Statler Hilton Hotel Buffalo, New York 14202 at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of: Richard J. Arcara, U.S. Attorney, Att: Edward J. Wagner, Asst. U.S. Atty. 502 U.S. Courthouse, Buffalo, New York 14202 Julie R. Johnson Sworn to before me this

PATRICIA A. LACEY NOTARY PUBLIC, State of N.Y., Genesee County My Commission Expires March 30, 19./....

17thday of February , 19 77